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Who is Afraid of the Aarhus Convention?

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From the Editors

Who is afraid of the Aarhus Convention? With its recent judgment in the *Vereniging Milieudefensie and Stichting Natuur en Milieu* cases (Cases C-401 to 403/12) the Court of Justice of the European Union (CJEU), once again, blocked an attempt to improve the legal position of environmental NGO's seeking administrative and/or judicial review of decisions of the EU institutions affecting the environment. The complicated problems regarding *locus standi* at the Court of Justice challenging acts of the European institutions are well documented (cf. the editorial in *REALaw* 2011/1). The cause of all this? The requirement of Article 263(4) TFEU of direct and individual concern, as it has been interpreted by the CJEU since many years. The leading 'environmental' case on the admissibility of interested third parties trying to annul decisions of the EU institutions affecting the environment is still the *Greenpeace* case (Case C-321/95 P). As far as the *locus standi* of Greenpeace was concerned, the Court of Justice upheld the view of the Court of First Instance (now General Court) that an association formed for the protection of the collective interests of a category of persons could not be considered to be directly and individually concerned, for the purposes of Article 263(4). Although the CFI, in the *Jégo-Quéré* case (Case T-177/01), tried to change this restrictive attitude, the Court itself made it abundantly clear, in its judgment in case *Unión de Pequeños Agricultores v. Council* (Case C-50/00 P.), that any changes should be the result of amending the EU treaties.

In short, if more direct access is required, then this must be arranged via the front door (amending the treaty), rather than by secretly introducing access via the backdoor of court interpretation according to the CJEU. And, for that matter, there is also a national court that can be addressed. The 'invitation' to arrange the issue, 'via the front door', as we all know, has only been included half-heartedly in the Lisbon Convention and has not resulted in any substantial widening or improvement.

In 2012 the CFI made another attempt. It found, in an appeal for annulment brought by a number of environmental organisations, that Regulation 1367/2006 was incompatible with the Convention of Aarhus. That Convention, to which the EU is also party, requires in Art. 9(3) that parties including environmental organisations 'have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment'. Because the access to the court was almost completely cut off after the *UPA* judgment had been given, the European legislator believed that it could remain 'in compliance with Aarhus' by creating some kind of objection procedure (viz. internal review by the institution that took the decision) in the above-mentioned Regulation. The only problem was that in that Regulation, and certainly in the manner in which it was applied by the Council and the Commission, the *Plaumann* approach

was imported. In short: there was still no question of real access to an ‘administrative’ procedure within the meaning of the Aarhus Convention.

The CFI had found, and in my view perfectly rightly so, that the Regulation was in violation of Art. 9(3) of the Aarhus Convention. However, the problem that the CFI was faced with was that the CJEU, in an earlier judgment (*Slovak Brown Bears*, Case C-240/09), had already held that precisely that provision had no direct effect. In an attempt to attach legal consequences to the violation of that article of the Convention nevertheless, the CFI ‘worked magic’ and conjured up the rather obscure *Fediol/Nakajima* exception (Cases 70/87 and 69/89). According to the CFI that exception allowed it to test the validity of an act of the European Union against the rules of an international agreement, even if these rules had no direct effect. This would apply in cases where the European Union intends to implement a specific obligation within the scope of that agreement or if secondary legislation refers to specific provisions of that agreement. Brave, but perhaps destined to fail. In the *Vereniging Milieudefensie* and *Stichting Natuur en Milieu* cases, the CJEU needed only a few words to point to the special factual and legal context of *Fediol* and *Nakajima* and found that this approach could not just simply be ‘transplanted’ to the Aarhus Convention.

This means that we are back to square one: Art. 9(3) of the Aarhus Convention cannot achieve a better legal protection position for environmental organisations after all, at least not in so far as it concerns legal protection against decisions of the European institutions themselves.

How to proceed? The fact that Article 10(1) of Regulation 1367/2006 is in violation of Art. 9(3) of the Aarhus Convention still seems evident to me. After all, the Regulation wrongly restricts access to the internal review procedure to individual administrative acts. However, this problem cannot be solved by the European courts. Art. 9(3) Aarhus Convention has no direct effect nor can it be raised as an exception of illegality against European Regulations and Directives.

I no longer have much faith in the fact that the EU legal order will appear to be able to start acting in conformity with the Aarhus Convention at short notice in this file. Perhaps further pressure from ‘outside’, by which I mainly mean from the compliance mechanism of the Aarhus Convention itself, could result in some improvement in the longer term. As long as that does not happen, the conclusion must unfortunately be that the issue of access to justice has in the meantime been fairly well provided for in most EU member-states, but that the EU itself is gradually becoming known as the proverbial black sheep.

‘Who is afraid of the Aarhus Convention? We are, George, we are.’

This ‘special issue’ of *REALaw* ‘Proceduralisation of EU law through the back-door’ is the result of a workshop held at Maastricht University in 2014. Dr. Mariolina Eliantonio and Dr. Elise Muir organised the workshop and edited the papers presented there. In recent years, there has been a bourgeoning of legislative initiatives as well as legislative rules placing emphasis on judicial

enforcement and remedies across several EU policies. Examples include the debate on the implementation of the Aarhus Convention as well as several instruments in the fields of EU competition and consumer protection law.

This process is remarkable in so far as it leads to the setting of standards concerned with access to justice and judicial remedies in the context of a substantive EU policy. Indeed, these standards are not introduced as a result of the exercise by the EU of its competences in the field of judicial cooperation in civil matters (or even criminal matters) but on the basis of a distinct substantive policy of the EU.

The resulting procedural rules illustrate the tension between the existence of a substantive EU competence and the lack of an explicit corresponding procedural competence. Yet, a concern for the 'effet utile' or effectiveness of a substantive EU competence combined with the wish to ensure an effective remedy against breaches of EU law (see Art. 47 CFEU) leads the EU legislature to adopt procedural rules that are deemed necessary for the coming into effect of the substantive competences.

The presence of procedural rules enshrined in EU substantive law is not new as will be explained in the first contribution to this special issue by Prof. dr. Olivier Dubos. Its effects on national administrative law are well explored. Nevertheless, its impact on judicial processes (in contrast to administrative practices) at domestic level have been subject to little investigation to date although the extent of the phenomenon in recent years is unprecedented; hence the focus of this special issue on procedural rules applicable before national courts.

Such an observation calls for two central research questions. At 'micro' level, are these developments coherent within a policy or across comparable EU policies? This will be examined in each of the articles submitted that focus on selected EU policies (competition, consumer protection, public procurement, environmental law, data protection and anti-discrimination). At 'macro' level, does this trend tell us anything important about the evolution of the EU legal order? This question will be addressed by Mariolina Eliantonio and Elise Muir and brings together the observations made by all contributors in an analytical way.

In addition to those 'Maastricht' articles, this volume of *REALaw* concludes with a most interesting contribution of Prof. dr. Ferdinand Wollenschläger on EU Law Principles for Allocating Scarce Goods in which he identifies substantive and procedural requirements for developing a new type of administrative procedure.

Jan H. Jans